United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-2141

To be argued by
SHEILA GINSBERG

B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
NICHOLAS MYSHOLOWSKY,

Petitioner-Appellant,

-against-

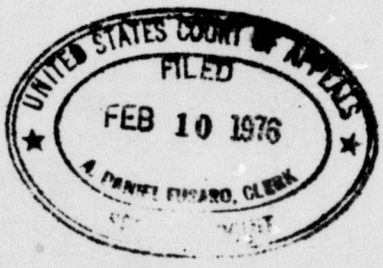
PEOPLE OF THE STATE OF NEW YORK,

Respondent-Appellee.

Docket No. 75-2141

REPLY BRIEF FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Petitioner-
Appellant MYSHOLOWSKY
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. NICHOLAS MYSHOLOWSKY, Petitioner-Appellant, -against- PEOPLE OF THE STATE OF NEW YORK, Respondent-Appellee.	Docket No. 74-2141

REPLY BRIEF FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

The State's brief demands reply because it asserts facts contradicted by the record, ignores critical evidence establishing misidentification, and misconstrues applicable law. The errors, in the order they appear in the State's brief, follow, seriatim:

1. The photograph of appellant displayed in the "rogues gallery" on the day of the crime was not, as the State would have it (Br. at 7 and 21), the then fifteen-year old, 1938,

picture. The explicit testimony of Detective Gronachan, of the Bureau of Criminal Identification, establishes unequivocally that the 1938 photo, marked into evidence as Exhibit #6, was not present in the "rogues gallery" on September 22, 1953 (706[1]).

Moreover, it appears that the picture the Tullys viewed and failed to identify a few hours after the crime was the one-year-old, 1952, photograph. This picture was the only other one used by the police in their investigation; further, it had been taken the year previous for the specific purpose of using it in "rogues galleries" and other, similar police files. This photograph was also the one which, when suggestively displayed a month later, inspired Mr. and Mrs. Tully to identify appellant as the robber.

Thus, the Tullys' inability on the day of the robbery to identify appellant's one-year-old photo is probative of the fact that appellant may well be innocent and that the witnesses' subsequent identification of him was only the product of taint.

2. Ignored by the State is the uncontested evidence that appellant's appearance at the time of the robbery was substantially different from the description given by the witnesses soon after the crime. For example, the robber's weight

---

[1]Numerals in parentheses refer to pages of the trial transcript.

[2]Also illustrative of the taint is the fact that Santorico, who was not subjected to the suggestive display, did not pick appellant's photograph as that of the robber.

was estimated by Santorico as being 160 pounds, and by the Tullys as being between 160 and 180 pounds.[3] In contrast, police records made one month after the robbery at the time of appellant's arrest establish that appellant weighed 212 pounds. This discrepancy, notably absent from the State's brief, is at least thirty pounds, perhaps as much as fifty pounds, but in either instance, unquestionably significant in the appearance of a man approximately five feet eight inches tall.

The State also fails to acknowledge that the 1,300-page record is devoid of any evidence corroborating the witnesses' identification of appellant as the gray-haired robber. In fact, the State seeks to imply the opposite, by reliance (Br. at 32) on evidence corroborative of Sadowy's guilt. To do so, however, hopelessly misses the point: not only is the evidence of Sadowy's culpability irrelevant to establishment of appellant's guilt, but also, on this record, some of that very evidence was directly probative of appellant's innocence. While it is not disputed that Sadowy and another -- a gray-haired, stocky man -- committed the robbery, the State's rebuttal testimony of Frances Karwoski indicates that appellant

---

[3]The State's reliance on the similarity of the descriptions given by each of the witnesses (Br. at 18) is misplaced. In light of Mrs. Tully's admissions that she and her husband discussed and exchanged descriptions, and Santorico's testimony about the "pablum" jacket, the similarity is clearly the product of collaboration rather than accuracy of recollection.

was not that man. Karwoski testified that the man she had seen accompanying Sadowy shortly after the crime was not in the courtroom.[4]

3. Foster v. California, 394 U.S. 440 (1969), rather than being "clearly distinguishable," as the State argues (Br. at 28), is, instead, dispositive of this appeal. Eyewitnesses in this case, like the witness in Foster, were subject to repeated suggestive identification procedures which produced tentative identifications[5] followed by a lineup which finally produced positive identification. Moreover, the facts of this case are more egregious than those presented in Foster. Here, appellant was the subject of several photographic showups, patently more invidious than the first lineup in Foster which, while found to be suggestive (the height of the defendant differed from the height of the other participants), at least provided the witness there with the semblance of choice absent in this case. Therefore, as in Foster,

---

[4]Unfortunately, the exculpatory nature of the testimony was lost on the jury since defense counsel, representing both appellant and Sadowy, was not free to make this argument to the jury. The resulting, but improper, implication was that if Sadowy was guilty, so was appellant.

[5]While the State asserts (Br. at 28) that "Mr. and Mrs. Tully refused to identify the picture of [appellant] regardless of any suggestive procedures," the record squarely contradicts this assertion. After studying the 1952 picture for five or ten minutes, Mrs. Tully testified, she told the police that she "was beginning to feel pretty sure about that picture" (155-156). Mr. Tully's reaction when the same photograph was singled out for his inspection was that appellant looked like the robber (369).

> [t]he suggestive elements of this identification procedure made it all but inevitable that [the witness] would identify petitioner whether or not he was in fact "the man."
>
> Foster v. California, supra, 394 U.S. at 443.

Incredibly, the State would have this Court accept (Br. at 25) that the singling out of one photograph is not suggestive because the record does not indicate that the police simultaneously announced that appellant was the robber. This is simply not the law. Foster v. California, supra, 394 U.S. at 443; United States ex rel. Braithwaite v. Manson, Doc. No. 75-2093, slip op. 595 (2d Cir., November 20, 1975). Explicitly, in Foster, where the police also did not say "this is the robber," the Court nonetheless held that, by the suggestive procedures, "[i]n effect, the police repeatedly said to the witness, 'This is the man.'" Foster v. California, supra, 394 U.S. at 443 (emphasis in the original).

Each of the cases cited by the State (Br. at 28-29) to support its position that suggestiveness does not necessarily give rise to a substantial likelihood of misidentification are distinguishable from this appeal. In United States ex rel. Polla v. Reid, Doc. No. 75-2076, slip op. 1025 (2d Cir., December 11, 1975), and United States ex rel. Smiley v. LaVallee, 473 F.2d 682 (2d Cir. 1973), the pretrial identification procedures were not suggestive, and in United States ex rel. Rutherford v. Deegan, 406 F.2d 217 (2d Cir. 1969), the wit-

nesses' description of the perpetrator fit the defendant; in United States v. Mims, 481 F.2d 636 (2d Cir. 1973); United States ex rel. Gonzalez v. Zelker, 477 F.2d 797 (2d Cir. 1973); and United States ex rel. Phipps v. Follette, 428 F.2d 912 (2d Cir. 1970), other corroborative evidence in the case precluded the necessary finding of a likelihood of misidentification.

In contrast, in this case the pretrial photographic procedures were impermissibly suggestive; in the absence of suggestiveness the witnesses did not identify appellant; their descriptions after the crime were not descriptive of appellant; and there was absolutely no evidence in the case to corroborate the eyewitness identification. Therefore, while the State makes much of the argument that the witnesses had sufficient opportunity to observe the robber at the time of the crime, the point here is that, despite this opportunity, the witnesses apparently failed to make an accurate observation. Thus, the petition must be granted.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Petitioner-
Appellant MYSHOLOWSKY
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel.

February 9, 1976